Supreme Court, U.S.
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No. 97-2044

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

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UNITED STATES OF AMERICA,
*Petitioner,*

v.

HAGGAR APPAREL COMPANY,
*Respondent.*

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On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

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# BRIEF OF RESPONDENT

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RONALD W. GERDES*
GILBERT LEE SANDLER
EDWARD M. JOFFE
SANDLER, TRAVIS & ROSENBERG, P.A.
1300 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 638-2230

CARTER G. PHILLIPS
MARK E. HADDAD
DANIEL MERON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

MARC W. JOSEPH
HAGGAR CLOTHING CO.
6113 Lemmon Avenue
Dallas, TX 75209

Counsel for Respondent
* Counsel of Record

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## QUESTIONS PRESENTED

1. Whether regulations issued by the Treasury Department under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether 19 C.F.R. 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.80 of the Harmonized Tariff Schedule of the United States to exclude the "permapressing" of items of clothing assembled abroad.

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## INTRODUCTION

The United States presents this case as a syllogism. Agencies with rulemaking authority get *Chevron* deference; Customs is such an agency; therefore the Customs' rule at issue here deserves *Chevron* deference.

We agree that this case may be readily resolved, but not in Customs' favor. In a provision aptly entitled "Scope and Standard of Review," Congress specifically addressed the scope and standard of judicial proceedings in each of the civil actions subject to the jurisdiction of the Court of International Trade. 28 U.S.C. § 2640. There, and in surrounding, related provisions, Congress made clear that, in tariff classification cases, the scope of review is not limited to the administrative record and that the standard of review is accordingly not deferential but *de novo*. The legislative history of these provisions, repeated written presentations to Congress by the Department of Justice, and two centuries of practice confirm what the statutory provisions set forth on their face: challenges to Customs' tariff classifications are to be reviewed *de novo* in federal court. This fact alone is dispositive, because it is settled law that, when Congress provides for *de novo* review in the federal courts, *Chevron* deference does not apply.

While Congress' imposition of a *de novo* standard is, by itself, enough to decide this case, there is much more to support the judgments below. Most notably, the excerpts of statutes and legislative history on which the United States selectively relies for Customs' supposed rulemaking authority, when examined in context, demonstrate uniformly that Congress did not give Customs, and Customs never understood itself to have, authority to issue substantive rules concerning tariff classifications that would bind litigants in classification disputes. Customs has historically been, and today remains, quintessentially an enforcement agency, and it intended its interpretive tariff classification rules to bind only its own officers, not the courts.

The Solicitor General's syllogism thus ignores not only those

statutory provisions that bear most directly on the question presented, but also the broader statutory, regulatory, and historical context in which any assertion that Customs is entitled to deference in this matter should be considered. We therefore begin with a brief historical summary of the longstanding right of importers to bring civil actions in federal court to challenge Customs' classifications of goods. We also briefly describe Customs' limited role in implementing the trade policy of the United States, and then summarize the proceedings in this case.

## STATEMENT OF THE CASE

### A. Civil Actions To Contest Customs' Classifications

#### 1. The First 100 Years – The Right To A Jury Trial

Throughout the nation's first 100 years, with the exception of one significant 36-day interval discussed below, importers enjoyed the right to challenge the classification of goods by a customs official by instituting a civil jury trial in either federal or state court in which all questions of fact and law were adjudged *de novo*. The second statute that Congress passed, the Act of July 4, 1789, ch. 2, 1 Stat. 24, set forth a tariff schedule and imposed duties on imported goods. The lower courts quickly recognized (as English courts previously had), and this Court eventually confirmed, that the common law provided a right of action (in assumpsit) against the collector personally "to recover back an excess of duties paid to him as collector" in light of an erroneous classification. *Elliot* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 158 (1836); see *Campbell* v. *Hall*, 98 Eng. Rep. 1045 (King's Bench 1774) (Lord Mansfield).

This exposure to personal liability led most collectors to hoard, and some to embezzle, contested duties. Congress responded with the Act of March 3, 1839. This Act required that collectors pay disputed sums to the United States Treasury, and required the Secretary of the Treasury to refund any duties later found to have been erroneously collected. *Id.* ch. 82, § 2, 5 Stat. 339, 348-49. In *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 239-52 (1845), this Court construed the Act to eliminate the common law right of action against the collector, and held that



the power to resolve customs disputes now rested exclusively with the Secretary of the Treasury.

Justices Story and McLean dissented. They argued that Congress intended only that the Secretary hold the disputed funds during litigation, not that litigation be eliminated. Justice Story's assessment of the need for *de novo* judicial review in classification disputes is strikingly apt to the classification dispute now before this Court:

> [G]rave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision . . . .
>
> Besides, we all know that, in all revenue cases, it is the constant practice of the secretary of the Treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. . . . Of what use then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of this court as well as those of the other courts of the United States establish in the fullest manner, that the interpretations so given by the secretary of the Treasury have, in many instances, differed widely from those of the courts. The Constitution looks to the courts as the final interpreters of the laws.

44 U.S. (3 How.) at 256-57.

Justice Story's dissent was quickly vindicated. Six days after *Cary* v. *Curtis* was handed down, a bill to restore a right of action against the collector was introduced in the Senate. Cong.

Globe, 28th Cong., 2d Sess. 195 (1845). Thirty days later, Congress enacted the Act of February 26, 1845, ch. 22, 5 Stat. 727, establishing a statutory right to a trial by jury against the collector. See George Stewart Brown, The United States Customs Court I, 19 ABA J. 333, 336 (June 1933).

### 2. The Second 100 Years -- Trial *De Novo* Before A Specialized Court

By the 1880s, the volume and complexity of customs litigation had overwhelmed the ability of the courts to handle the caseload efficiently and effectively, and lack of uniformity in decisions was of serious concern. Rather than rely on deference to agency decisions, Congress responded by creating specialized trial and appellate courts to handle Customs' cases. See generally *United States* v. *Stone & Downer Co.*, 274 U.S. 225, 232-34 (1927).

Congress began in 1890 by creating a nine-member Board of General Appraisers to hear appeals from decisions of customs officials, with an appeal to federal circuit courts. Act of June 10, 1890, Ch. 407, 26 Stat. 131. In response to strong objections concerning the abolition of the right to a jury trial, the Act provided for "a review of the questions of law and fact" by the federal court, and further permitted the introduction of new evidence before the reviewing court. *Id.* § 15.

One exception to *de novo* review was the appraisal of the value of the imported goods. On this issue of valuation, the Secretary received deference on the facts, because Congress had expressly mandated in the 1890 Act that the appraiser's judgment would "be final, unless the appraisement were in some respects unlawful." *Erhardt* v. *Schroeder*, 155 U.S. 124, 130 (1894); see *Passavant* v. *United States*, 148 U.S. 214, 220 (1893). Nevertheless, this Court refused to defer to "the practice, under instructions issued by the Secretary of the Treasury," to treat certain aspects of "*classification*" as part of the appraisal of the value of the imported goods. *Erhardt*, 155 U.S. at 130-31 (emphasis added). Instead, the Court reaffirmed that, apart from the appraisal, "a party dissatisfied with the classification of imports may apply to the court to have



examined and reviewed *everything* involving the legality of the [collector's] demand." *Id.* at 129 (emphasis added).

In ensuing years, Congress took additional steps to achieve uniformity in the resolution of Customs' disputes by further centralizing judicial review in specialized courts. In 1909, Congress created a specialized appellate court, the Court of Customs Appeals, with exclusive jurisdiction to hear appeals from the Board. Act of August 5, 1909, ch. 6, § 29, 36 Stat. 11, 105-6. In 1926 Congress renamed the Board the United States Customs Court. Act of May 28, 1926, ch. 411, 44 Stat. 669, 669. Congress later conferred Article III status on both courts.[1] The Customs Court reviewed all legal and factual issues in classification cases *de novo*. See, *e.g.*, Tariff Act of 1922, § 514, ch. 356, 42 Stat. 858, 969 (importer may challenge "[a]ll decisions of the collector, including the legality of all orders and findings entering into the same"); *C.J. Tower & Sons* v. *United States*, 33 Cust. Ct. 14, 15 (Cust. Ct. 1954) ("[t]he courts are not influenced by the interpretative rulings made for the guidance of customs officers" in "the construction of the tariff laws"); *American Express Co.* v. *United States*, 39 CCPA 8, 8 (Cust & Pat. App. 1951) ("meaning of a . . . term used in a tariff act is a question of law to be decided by the court").

In 1970, with the United States Customs Court again facing a "rapidly expanding workload," S. Rep. No. 91-576, at 7 (1969), Congress enacted the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274. Among other things, this Act continued to give the Customs Courts exclusive jurisdiction over "the legality of all orders and findings entering into" a classification dispute, 28 U.S.C. § 1582(a) (1970), and permitted the Customs Court to consider "any new ground" in a civil action challenging a tariff classification. *Id.* § 2632(d); See S. Rep. No. 91-575 at 18 (1969).

Nine years later, Congress addressed the standard of review

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[1] Act of Aug. 25, 1958, Pub. L. No. 85-755, § 1, 72 Stat. 848; Act of July 4, 1956, ch. 589, § 1, 70 Stat. 532,532; see *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962).

for antidumping and countervailing duty cases. The Senate Report noted that the state of the law in this area was "unclear and conflicting," S. Rep. No. 96-249, at 251 (1979); two courts in 1979 had concluded that countervailing duty cases should be subject to the same "de novo" standard of review that applied to classification cases. *ASG Indus., Inc.* v. *United States*, 467 F. Supp. 1200, 1231-38 (Cust. Ct. 1979); *Michelin Tire Corp.* v. *United States*, 469 F. Supp. 270, 273-77 (Cust. Ct. 1979). Congress instead provided for deferential review of the administrative record. Tariff Act of 1930, § 516A(b)(1)(B) (as added by the Act of July 26, 1979, Pub. L. 96-29, § 1001(a), 93 Stat. 300), codified at 19 U.S.C. § 1516a(b)(1)(B).

One year later, Congress enacted "a comprehensive system of judicial review of civil actions arising from import transactions" that "clarified and expanded [the] jurisdiction" of the Customs Court and changed its name to the Court of International Trade (CIT). H.R. Rep. No. 96-1235, at 20 (1980); see Customs Court Act of 1980, Pub. L. No. 96-417, § 192(a) 94 Stat. 1727, 1727. Notably, in a provision entitled "Scope and Standard of Review," Congress listed each of the actions over which the CIT had jurisdiction and identified precisely the scope and standard of review applicable to each. For example, Congress preserved the *de novo* standard of review for civil actions challenging classifications, and similarly confirmed that challenges to countervailing duties would be subject to deferential review of the administrative record. 28 U.S.C. §§ 1581(a), 2640(a), (c); 19 U.S.C. § 1515. Similarly, as discussed further below, Congress declined the repeated request of DOJ to restrict the CIT to deferential administrative review of advance rulings concerning classifications. 28 U.S.C. § 1581(h). In seeking deferential review for advance rulings, DOJ repeatedly emphasized that it was not suggesting that Congress make any change to the "sweeping" standard of "de novo" review that applies to protests of classifications. See pages 19-20, *infra*.



### B. The Role of Customs In United States Trade Policy

The regulations for which the United States now seeks *Chevron* deference interpret provisions of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202. That schedule is the successor to the Tariff Schedule of the United States (TSUS), which originally was drafted by the United States Tariff Commission and adopted by Congress in 1962. Tariff Classification Act of 1962, Pub. L. No. 87-456, 76 Stat. 72. Congress has expressly delegated responsibility for publishing the HTSUS, and for making recommendations for its modification, not to the Secretary of the Treasury, but to the successor to the drafting agency, the United States International Trade Commission ("ITC"). See 19 U.S.C. §§ 3002(1), 3005, 3007. The recommendations for modifications are then to be reviewed by the President, who has the power to "proclaim modifications" to the HTSUS that are presented to Congress for review during a 60-day "lay-over period." *Id.* § 3006(b)(1).

The President, in turn, has delegated his authority to submit reports recommending modifications to Congress under § 3006, not to the Secretary of the Treasury, but to the United States Trade Representative ("USTR"). Memorandum of Dec. 12, 1991, 56 Fed. Reg. 65413. Such delegation is consistent with Congress' decision to make the USTR "responsible for coordination of United States trade policy in relation to the [International] Convention [on the Harmonized Commodity Description and Coding System]," see 19 U.S.C. §§ 3002(2), 3009, as well as to subordinate the work of the Treasury and Commerce Departments and the International Trade Commission to the "policy direction of the Office of the United States Trade Representative . . . with respect to the activities of the Customs Cooperation Council relating to the Convention." *Id.* § 3010(a)(1). See also *id.* § 2171 (listing the broad responsibilities and powers of the USTR to formulate and coordinate trade policy). It is thus the President (USTR), on the recommendation of the ITC, to whom Congress delegated

authority to modify the very language that Customs now claims to have been given definitive authority to interpret.

Congress has not granted Customs comparable authority. As the agency responsible for enforcing the tariff schedules, Customs has been given authority to make rules that bind and bring uniformity to the hundreds of daily judgments made by scores of customs officers at the various ports of entry. See pages 30-31, *infra*. Notably, the legislative history to Headnote 11 of the TSUS makes clear that the United States Tariff Commission (which drafted the Headnote as well as the Tariff Schedule) understood that Customs' role was limited to enforcing the provisions uniformly across the various ports of entry. See pages 31-33, *infra*. Customs then confirmed its own understanding of and acquiescence in this limited role when, in the very interpretive regulations in question, it disavowed any intent to bind anyone other than Customs officers:

> The definitions and regulations that follow are promulgated to *inform the public* of the constructions and interpretations that *the United States Customs Service* shall give to relevant statutory terms *and to assure the impartial and uniform assessment* of duties upon merchandise claimed to be partially exempt from duty under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 USC § 1202), *at the various ports of entry*. *Nothing* in these regulations purports or *is intended to restrict* the legal right of importers or others to a judicial review *of the matters contained therein*.

19 C.F.R. § 10.11(a) (emphasis added). This disclaimer is consistent with Customs' historic role as an enforcement agency, with agents who have express power to carry firearms, execute search and arrest warrants, and "perform any other law enforcement duty" the Secretary may assign them, see 19 U.S.C. § 1589a, and with reporting responsibilities within Treasury assigned to the Assistant Secretary for Enforcement.



See Office of the Federal Register, National Archives and Records Administration, *United States Gov't Manual* 449-50 (1997-98).

### C. Proceedings Below

Respondent Haggar Apparel Company designs, manufactures, imports, and markets a wide variety of men's apparel products. Respondent filed this civil action on July 21, 1993, to contest Customs' decision to assess a substantial duty on certain permanent press trousers. Pet. App. 9a-10a.

Permanent press garments are those that maintain a smooth, wrinkle-free appearance, with sharp pleats and creases, after they have been washed and worn and without ironing or pressing. J.A. 31, ¶ 17. Garments made purely of cotton, untreated with chemicals, cannot achieve these characteristics. *Id.* at 31-32, ¶ 20. The permanent press garments in this case were made either entirely of synthetic fiber, or of a blend of natural and synthetic fiber. *Id.* at 31, ¶ 17. If a blend is used, the fabric must first be "chemically treated" by being impregnated with resins. *Id.* at 31-32, ¶ 20. All of the fabrics at issue in this case were chemically treated in the United States. *Id.* at 37, 38, ¶¶ 47, 54.

In addition to the use of synthetic or blended fabrics, "[s]ome regulated heat process is necessary" to achieve the permanent press characteristics. J.A. 33, ¶ 24. That heating process, known as "curing," involves "pressing" the garments and, in some instances, also can involve baking them in an oven. *Id.* All of the fabrics at issue underwent "the same pressing and assembly process" in Mexico. Pet. App. 8a.

The garments at issue in this case are men's trousers, model number 245, that were manufactured in the United States and assembled in Mexico at Haggar's subsidiary. J.A. 29, 31, ¶¶ 5, 9, 19. For these trousers, Haggar used three fabric types. One was an all-synthetic blend, which "require[s] pressing, but do[es] not require resin treatment or baking," to acquire permanent press characteristics. Pet. App. 8a; J.A. 48. A second fabric type was a blend of cotton and polyester that was heated and

thus "pre-cured" at the textile mill in the United States. J.A. 35, ¶¶ 33, 34.

The third fabric, also a blend, was post-cured in Mexico "by pressing and ovenbaking." J.A. 37, ¶ 42. For this fabric, the pressing "begins the curing process" that ovenbaking completes. Pet. App. 16a. Ovenbaking involves "load[ing]" the assembled trousers on a conveyer belt and baking them in an oven for a period of 12 to 15 minutes. *Id.* at 8a; J.A. 33, ¶ 26. In lieu of ovenbaking, the curing process could have been completed by continuing to press the garments for an additional two to three minutes. J.A. 57. Because ovenbaking "is an automatic process" that, for Haggar, involved equipment that was "fully depreciated," it was less expensive than further pressing. Pet. App. 18a, 19a; J.A. 41-42, 57; Tr. at 79-87.

Customs granted a duty allowance under TSUS 807.00 and HTSUS 9802.00.80 for the trousers that were assembled from all-synthetic or pre-cured fabric. J.A. 35, ¶ 34. Customs denied an allowance, however, for the trousers assembled from post-cured fabric.

The CIT, "in a thorough opinion by Chief Judge DiCarlo," Pet. App. 2a, overturned Customs' decision. *Id.* at 7a-24a. The CIT framed the "dispositive issue" in the case as "whether oven-baking is an operation incidental to assembly." *Id.* at 11a. The court included pressing in its analysis because pressing "begins the curing process which, once started, imparts permanent new characteristics to the pants." *Id.* at 16a.

The CIT then compared the pressing and ovenbaking operations with the assembly process that preceded them, using criteria set forth in *United States* v. *Mast Industries, Inc.*, 668 F.2d 501 (C.C.P.A. 1981). Pet. App. 17a-21a & n.1. The CIT determined that the cost of pressing and baking as compared to assembly was minor. *Id.* at 17a, 21a. The court also determined that, although the ovenbaking operation was "unrelated to assembly," *id.* at 19a, "strong economic and practical considerations dictate that curing be performed concurrently with assembly." *Id.* at 21a. The court therefore concluded that



the curing operation was "incidental to the assembly process" within the meaning of the statute. *Id.*

The CIT then rejected the government's argument that the duty allowance should be denied because the garments "had undergone a prohibitory advancement in value." Pet. App. 22a. The court explained that the plain language of the statute "does not prohibit an advancement in value, therefore, so long as the operation in question is incidental to assembly." *Id.*

For similar reasons, the CIT rejected Customs' argument that 19 C.F.R. § 10.16(c) governs the application of the statute. The CIT held that this regulation "conflicts with the plain language of item 807.00" because it classifies as non-incidental those operations "'whose primary purpose is the fabrication, completion, physical or chemical improvement of a component,'" Pet. App. 22a (quoting § 10.16(c)), whereas the statute "does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements . . . so long as the operation imparting those characteristics was incidental to assembly." *Id.* at 23a (emphasis in original).

Finally, the court determined that Customs' regulation was not entitled to deference under this Court's opinion in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Customs never argued that its regulations applied or merited *Chevron* deference until the court requested briefing of the issue during post-trial briefing. J.A. 9, Dkt. Nos. 54, 55. The Court then rejected the government's argument based on Federal Circuit authority. Pet. App. 23a-24a.

The government appealed and the Federal Circuit affirmed. Pet. App. 1a-4a. The court of appeals agreed with the CIT's *Mast* analysis "of the curing operation," and affirmed its analysis that "the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process." *Id.* at 3a. The court of appeals also rejected the government's claim for *Chevron* deference, relying on two of its recent

holdings, including *Universal Electronics Inc.* v. *United States*, 112 F.3d 488 (Fed. Cir. 1997). Notably, in that case, also a classification dispute, the court of appeals explained:

> The Court of International Trade does not defer to Customs' decisions because *it has been tasked by Congress to conduct a de novo review*, and to determine the correct classification *based on the record made before it. See 28 U.S.C. §§ 2640(a)*; 2643(b).

*Id.* at 493 (emphasis added).

## SUMMARY OF ARGUMENT

### I

Congress expressly and dispositively resolved the first question presented when, in 1980, it preserved the right of importers to challenge Customs' tariff classifications in a trial *de novo* in federal court. In section 301 of the Customs Courts Act of 1980, 28 U.S.C. § 2640, Congress expressly made choices about the scope and standard of review for each of the civil actions over which the CIT has jurisdiction. For some of these actions, Congress chose to grant review only on the basis of the administrative record in accordance with Administrative Procedure Act standards. See 28 U.S.C. §2640(b)-(e). For others, including "[c]ivil actions contesting the denial of a protest [of a classification] under section 515 of the tariff Act of 1930," Congress provided for review "upon the basis of the record made before the court," *id.* § 2640(a), which may include "any new ground in support" of the civil action, *id.* § 2638, as well as new "evidence" and "witnesses," *id.* § 2641. Moreover, the CIT's decision must be supported by "findings of fact and conclusions of law" or by "an opinion stating the reasons and facts upon which the decision is based." *id.* § 2645(a)(1), (a)(2). In short, as both the Senate and House Reports state, and as DOJ repeatedly conceded in written testimony submitted to Congress, classification cases are to be tried "*de novo*."

The right to a *de novo* trial conclusively resolves the



deference issue that the Solicitor General now raises. For *Chevron* deference is merely a rule of statutory construction that courts are to apply where Congress has indicated its preference to have an agency administer a particular law. Where Congress expressly assigns to the judiciary the right to hear a case *de novo*, there is -- by congressional design -- no role for agency deference. Indeed, this is true even in cases, unlike this one, where Congress indisputably has given the agency rulemaking power in the very area subject to *de novo* judicial review. Thus, even if Customs had been granted authority to issue substantive interpretations of the HTSUS, the express grant of *de novo* judicial review in classification cases would supersede it.

But Customs has not been given any such authority. Its authority to interpret substantive provisions of the tariff schedule is limited to binding customs officials at the ports of entry. This is plain both from the supporting authorities cited in the regulation, and from the regulations' own express purpose merely to achieve uniformity "at the ports of entry" and not to "restrict" the rights of importers seeking a judicial determination of the proper classification. 19 C.F.R. § 10.11. No deference is owed to regulations that the agency itself did not intend to be binding on parties other than agency officials. For this independent reason, Treasury is owed no deference on these regulations.

### II

Because the lower courts properly afforded respondent the *de novo* judicial review that Congress provided, the Court need not reach the second question presented. That question, whether the Secretary's rule, 19 C.F.R. § 10.16(c), is reasonable under *Chevron*, arises only if this Court is persuaded that the Secretary's rules merit *Chevron* deference. Nevertheless, were the Court to reach the second question, it could not affirm the regulation as reasonable, for four independent reasons.

First, the Solicitor General's categorical approach conflicts with the plain meaning of the statute. As interpreted by the Solicitor General, the regulations are to be understood to have

"deemed" certain operations, such as permapressing, "not to be incidental to assembly." Pet. Br. 26. Viewing the regulations to establish, *ex ante*, which operations are inherently not incidental "to assembly," *id.*, conflicts with the statutory requirement that a particular operation be compared to "the assembly process" that it accompanied. 19 U.S.C. § 1202, subheading 9802.00.80. Furthermore, the Solicitor General's view that permapressing operations are never incidental to assembly because they involve "chemical treatment" whose "primary purpose" is the "chemical improvement" of an article, 19 C.F.R. § 10.16(c), also conflicts with the statute. The statute presupposes that the operation in question will have "improved in condition" a given article, but nevertheless permits a duty allowance so long as that operation is "incidental to the assembly process." 19 U.S.C. § 1202, subheading 9802.00.80. The regulations thus end the analysis precisely where the statute says it should begin.

Second, the Solicitor General's interpretation of the Customs' regulations here conflicts with Customs' established practice and the Solicitor General's own prior interpretation. In the past, Customs and the Solicitor General consistently have argued that both the examples in the statute of incidental operations (*i.e.*, "cleaning, painting, and lubricating") and the examples in the regulations of incidental operations (*e.g.* "pressing") and of non-incidental operations (*e.g.* "permapressing") are illustrative and do not obviate the need for a case-by-case analysis of whether the particular operation alleged to be incidental is in fact minor when compared to the particular assembly process at issue. Thus, even if the Solicitor General's new interpretation of the law were otherwise permissible, the fact that it conflicts with the "uniform construction which . . . has been given by the treasury department . . . upon similar questions" renders that interpretation unreasonable. *United States* v. *Vowell and M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1810).

Third, the Solicitor General's attempt to apply the "permapressing" regulation to support Customs' decision below



is arbitrary. Permapressing did not take place abroad, because the "chemical treatment" to "impart new characteristics," 19 C.F.R. § 10.16(c)(4), occured in the United States. The curing of the fabric, which did occur abroad, is not equivalent to permapressing, because Customs permitted a duty allowance for the synthetic pants that were cured by pressing. The issue thus is whether using *ovenbaking* in addition to pressing to cure the blended fabric transformed that curing operation into one not incidental to the assembly process. Because ovenbaking merely accomplishes less expensively the same curing that additional pressing would accomplish, and because "pressing" is an operation that the regulations classify as incidental, the regulations, if they apply at all, actually support the judgment below.

Finally, on top of everything else, the agency cannot now receive deference because it has evidently lost the "numerous comments," Pet. Br. 29, that parties filed in response to the notice of proposed rulemaking. Without these comments, respondent cannot address, and this Court cannot determine, whether the agency reasonably responded to the facts and arguments put before it. This extraordinary defect is yet another example, if any were needed, of the unreasonableness of Customs' demand for deference.

## ARGUMENT

### I. *CHEVRON* DEFERENCE HAS NO ROLE IN THE CONGRESSIONALLY MANDATED TRIAL *DE NOVO* OF CLASSIFICATION DISPUTES

As the government ultimately concedes, the degree of deference that a particular agency determination is due depends on Congress' intent. Pet. Br. 13, 23. But in making the argument on that issue, the Solicitor General's submission to this Court is nothing short of startling. The brief for the United States entirely fails to inform the Court, let alone address, that: (1) the Customs Court Act has a provision, entitled "*Scope and Standard of Review*," which carefully and deliberately provides for a completely *de novo* trial before the CIT in all classifications

disputes (in stark contrast to other actions that *are* expressly made subject to deferential "arbitrary and capricious" review), 28 U.S.C. § 2640; (2) Congress delegated lawmaking power under the HTSUS to the President (USTR), in consultation with the ITC, the expert independent agency created by Congress to study the economic effects of the various tariffs; and (3) in the very regulations here at issue Customs took the formal position that its "interpretive" regulations were issued only to advise the public of the enforcement positions that Customs would take in the future, and to ensure uniformity *among the various customs offices*, and that the regulations did not even "purport[]" to restrict a protestor's right to a judicial determination "of the matters contained therein." 19 C.F.R. § 10.11(a). In the face of this formal position, the Court should give no weight to DOJ's contrary litigating position.

### A. Congress Granted Importers The Right To A Trial *De Novo* Of Classification Disputes

Although the brief of the United States virtually ignores the existence of this provision, a proper analysis of the *Chevron* issue should begin with an examination of 28 U.S.C. § 2640, entitled "Scope and Standard of Review." Section 2640 creates a clear and deliberate dichotomy. For many of the disputes that may be brought in the CIT, Congress provided deferential standards of review that traditionally apply to administrative agency review. For example, Congress provided that review of agency determinations in countervailing duty cases shall be governed by the "substantial evidence" test for issues of fact, and the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" test for issues of law and policy, and that the review in such cases would be limited to the record before the agency at the time it made the determination. 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b). As the Court is well aware, these are the traditional standards of review that are contained in the Administrative Procedure Act, 5 U.S.C. § 706. Congress likewise specified that courts shall review decisions of



the Customs Service under section 499(b) of the Tariff Act of 1930 "*on the basis of the record before the Customs Service* at the time of issuing such decision or order." 28 U.S.C. § 2640(d) (emphasis added). Similarly, Congress provided that "[i]n any civil action not specified in this section, the Court of International Trade shall review the matter as provided in [the Administrative Procedure Act]." 28 U.S.C. § 2640(e).

While Congress thus directed the CIT to review many Customs determinations under the APA's deferential standards and based on the administrative record, Congress clearly and deliberately provided for a trial *de novo* in a few limited categories of disputes -- including classification cases. Section 2640(a) expressly states in pertinent part:

> The Court of International Trade shall make its determinations *upon the basis of the record made before the court* in the following categories of civil actions:
>
> (1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515].

28 U.S.C. § 2640(a) (emphasis added). Civil actions under section 515 clearly involve a trial *de novo*. To begin with, Congress expressly provided that, unlike review of other actions, the court's decision in a tariff classification dispute would be based on "the record made before the court" -- not the record before the agency. Congress then confirmed beyond all doubt that review was *de novo* when it provided that in "any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the [CIT]," the court "may consider *any new ground in support of the civil action* if such new ground (1) applies to the same merchandise . . . and (2) is related to the same administrative decision." *Id.* § 2638 (emphasis added). Again, unlike deferential administrative review, Congress also provided that parties may produce and cross-examine witnesses and introduce documentary and other

evidence under the Federal Rules of Evidence. *Id.* § 2641. Finally, Congress directed the CIT in civil actions to file "a statement of findings of fact and conclusions of law" -- a requirement that is fully consistent with *de novo* review, but is out of place if the court were required to defer to the agency's findings and conclusions. *Id.* § 2645; see *id.* § 2646 (using term "retrial"). In short, the right to raise new issues and develop a new record unmistakably creates a *de novo* proceeding. See *Black's Law Dictionary* 435 (6th ed. 1990) ( defining "De Novo Trial" as "[t]rying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered").

In fact, these provisions are far more specific and compelling than others that this Court has previously found sufficient to create a right to *de novo* review. In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), this Court unanimously held that far less explicit provisions of the Civil Rights Act nevertheless "indicate[d] clearly" that Congress granted federal employees the right to "a trial *de novo*" following the processing of complaints by the Civil Service Commission. *Id.* at 844-45 (citation omitted). The Court relied on: (1) a provision directing the chief judge of a district to "'immediately . . . designate a judge in such district to hear and determine the case'"; (2) a provision for "assign[ing] for hearing"; (3) a direction about "schedul[ing] . . . [the case] for trial"; and (4) a direction that the court order appropriate relief if it "'finds'" that the defendant has committed an unlawful employment practice. *Id.* at 845 (footnote omitted). In contrast, the Customs Court Act of 1980 provides not only for findings of fact and for a trial with witnesses, but also for a civil action that is not based on the record before the agency, and in which parties may rely on any relevant ground, whether or not raised before the agency.

The legislative history unambiguously confirms that classification disputes are to be decided by the court *de novo*. The Senate Report states that "[p]roposed section 2640



specifies the scope and standard of review" in the CIT and that "[p]roposed subsection 2640(a)(1) provides for a trial de novo in suits commenced under proposed section 1581(a)." S. Rep. 96-466 at 18-19 (1979). The House Report likewise repeatedly states that "the bill preserves the right to a trial *de novo* for the review of a denial of a protest." H.R. Rep. 96-1235 at 44 (1980); see *id.* at 22 ("*De novo* review is the general rule for the majority of civil actions commenced in the [CIT].").

Even the Department of Justice has freely conceded the point in written submissions to Congress. At the time Congress was considering passage of the Customs Court Act of 1980, DOJ, the principal drafter and supporter of the bill, informed Congress that "the civil action challenges, *in a trial de novo*, a decision by the Customs Service" and stated that "[w]e strongly believe that this current method of obtaining judicial review ought to be maintained."[2] Remarkably, DOJ also told the Committee that "trial *de novo* is the *most sweeping form* of judicial review available" and that it was not DOJ's intent in drafting the bill "to change that principle at all."[3]

Congress' intent to provide for sweeping *de novo* review of Customs' protest denials also is vividly illustrated by the debate at the time of passage concerning the availability of review of classification rulings in advance of importation, a right that importers did not have under the pre-1980 law. The Department of Justice supported extending the jurisdiction of the court to pre-enforcement challenges to these rulings, but on

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[2] *Hearing on S. 1654 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 96th Cong. 15 (1979) (statement of David M. Cohen, Director, Commercial Litigation Branch, Department of Justice) ("1979 Senate Judiciary Committee Hearing") (emphasis added).

[3] *Hearing on S. 2857 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Comittee on the Judiciary*, 95th Cong. 62 (1978) (statement of David M. Cohen, Chief, Customs Section, Department of Justice) (emphasis added).

two conditions, only one of which was granted. See 28 U.S.C. § 1581(h). Of relevance here, the Department requested that the pre-enforcement review use the deferential "arbitrary and capricious" standard, explaining its position as follows:

> We also believe that the arbitrary and capricious standard is a fair exchange for the opportunity to obtain judicial review prior to the payment of duties. If an importer desires *de novo* review, it should complete the transaction, pay the duties, and institute suit in the Customs Court. If it desires judicial review in advance of the completion of the transaction and payment of the duties, it should be entitled only to review on the record under the arbitrary or capricious standard.

*Hearing on H.R. 6394 Before the Subcommittee on Monopolies and Commercial Law of the House of Representatives Committee on the Judiciary*, 96th Cong. 60 (1980) (statement of David M. Cohen, Branch Director, Commercial Litigation Branch, Department of Justice). Although early versions of the bill contained this requested limitation, see S. 1654, 96th Cong. § 301 (1979), Congress *deleted* the arbitrary and capricious requirement from the final bill, even for pre-enforcement challenges.[4] Thus, outside of litigation, the Department of Justice's position has been that actions contesting protest denials are subject to "sweeping" *de novo* review.

### B. *De Novo* Review Precludes Deference To The Agency's Legal Interpretations

Because the Solicitor General's brief nowhere acknowledges that classification disputes are subject to a *de novo* trial, the

[4] The predecessor to 28 U.S.C. § 2640(e) was in each of the bills before Congress at the time that DOJ lobbied Congress to add the "arbitrary and capricious" limitation to § 1581(h). *See, e.g.*, S. 1654, § 401(a). DOJ thus understood that, without its requested limitation, pre-enforcement challenges to protest denials would be reviewed under the *de novo* standard applicable to classification disputes, rather than under the APA standards provided in § 2640(e).



United States has not attempted in this Court to reconcile its argument with this dispositive fact. In the court of appeals, however, the government conceded that Congress provided for *de novo* review, but argued that this was limited to factual issues. In this Court, its claim for deference to Customs' construction of the tariff schedules rests ultimately on its assertion that the Tariff Act contains an "express delegation" of substantive rulemaking power to the Secretary of Treasury.

Neither of these arguments provides a basis for according *Chevron* deference to the regulations in tariff classification cases. When Congress confers a right to *de novo* judicial review, the law is clear that *de novo* review extends to issues of law as well as of fact. This is true even when the agency has substantive rulemaking authority.

1. Before this Court, the Solicitor General's view is that actions contesting Customs' protest denials are governed by provisions that are "analogous" to traditional deferential review under the Hobbs Act (where review is had directly in the courts of appeals) and the APA. Pet. Br. 16 n.4. In its Reply Brief in the Federal Circuit, however, the United States *conceded* that the statute provides for a *de novo trial* of classification disputes, but argued that this *de novo* standard extended only to questions of fact, not law. U.S. Reply Br. 6.

The Solicitor General's decision to abandon that theory here was well advised. Statutes providing for a *de novo* trial following an administrative determination are hardly unprecedented, and the uniform body of judicial decisions under such statutes rejects deference to the agency's construction of the relevant legal provisions. Indeed, in light of this settled understanding, Congress' expectation when it created a *de novo* action could have been only that the CIT would construe the relevant statutes without according deference to Customs' views.

The leading case establishing the significance of the "*de novo*" standard for review of legal determinations is this Court's

decision in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), a case that turned on the meaning of the term "privacy" in exemption 7(C) of the Freedom of Information Act. *Id.* at 762-67. In an opinion for the Court, Justice Stevens concluded that because the statute "directs the district courts to 'determine the matter de novo,'" review in FOIA cases was "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious." *Id.* at 755. Accordingly, the Court construed the term "privacy" on its own, and concluded that the requirement of *de novo* review meant that the "court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *Id.* at 776. The Court thus by no means limited its *de novo* review to issues of fact.

The Court understood the import of a *de novo* review provision in the same way in *United States* v. *First City National Bank*, 386 U.S. 361 (1967), a case under the Bank Merger Act. That Act provides that in any action challenging the decision of the Comptroller of the Currency to approve a bank merger, "the court shall review de novo the issues presented." 12 U.S.C. § 1828(c)(7)(A). Because the Act provided for *de novo* review, the Court rejected the view that the "arbitrary or capricious" standard would govern the interpretation and application of the Act's legal standards, concluding instead that "it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal." 386 U.S. at 369.

Consistent with these precedents, the courts of appeals have construed provisions establishing *de novo* review to require the court to determine on its own, without deference to the agency, not only issues of fact, but the meaning of the statutory terms as well. Writing for the *en banc* D.C. Circuit, then-Judge Ginsburg described the settled meaning of "*de novo*" review:

> De novo means here, as it ordinarily does, a fresh, independent determination of "the matter" at stake; the court's inquiry is not limited to or constricted by the administrative record, *nor is any deference due the agency's conclusion*. . . . Essentially then, the district court's charge was to put itself in the agency's piace.



*Doe* v. *United States*, 821 F.2d 694, 697-98 (D.C. Cir. 1987) (en banc) (emphasis added) (citations omitted). Indeed, the *en banc* court further confirmed that "*de novo*" review signals that "the legal issue presented is to be reviewed nondeferentially." *Id.* at 698 n.9. Other members of this Court have expressed a similar view. See *Aronson* v. *IRS*, 973 F.2d 962, 965 (1st Cir. 1992) (Breyer, C.J.) (where a statute provides for *de novo* review the court does not "defer, or give special weight, to the agency's [] answers to the . . . question of statutory interpretation"); *Church of Scientology* v. *IRS*, 792 F.2d 146, 148-51 (D.C. Cir. 1986) (Scalia, J.) (concluding that FOIA's *de novo* review standard applied and construing meaning of tax statute without deference to the IRS); *Church of Scientology* v. *IRS*, 792 F. 2d 153, 156-60 (D.C. Cir. 1986) (en banc) (Scalia, J.) (same).

To be sure, it is the exceptional statute that provides for *de novo* review. In addition to Title VII, FOIA, the Bank Merger Act, and the Privacy Act (which were discussed above), examples where a right to de novo review is provided by statute include the Food Stamp Act and the Banking Control Act. Courts interpreting each of those statutory review schemes have consistently held that "[w]hen a case is properly before the court for a trial de novo, the court must reach its own factual *and legal* conclusions." *Modica* v. *United States*, 518 F.2d 374, 376 (5th Cir. 1975) (emphasis added); *Sims* v. *Dep't of Agric. Food & Nutrition Service*, 860 F.2d 858, 862-3 (8th Cir. 1988) (citing numerous other cases) (Food Stamp Act); *Miller* v. *FDIC*, 906

F.2d 972, 976-77 (4th Cir. 1990) (Banking Control Act).[5]

In its reply brief below, the United States relied for its claim that the court should apply *Chevron* deference, despite the provision for a *de novo* action, on § 706(2)(F) of the APA, which provides that the court should set aside agency action "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(F). U.S. Reply Br. 6. Section 706(2)(F) of the APA, however, simply makes clear that the reviewing court must make its own determinations of fact when reviewing *de novo*; it does nothing to alter the settled understanding that the court must also reach its own legal conclusions in such actions. Cf. 5 U.S.C. § 706 (court should "decide all relevant questions of law"). Indeed, the precise argument advanced by the United States below was soundly rejected by the District of Columbia Circuit, sitting en banc. See *Church of Scientology* v. *IRS*, 792 F.2d at 156-63. In his separate concurrence in that case, Judge Silberman, relying in part on § 706(2)(F), argued that the court should apply *Chevron* deference to an agency's construction of a statute, even where the act provides for a *de novo* trial, *id.* at 168-172. However, not a single other judge on that *en banc* court agreed with Judge Silberman's view, see *id.* at 160-63 (Scalia, J.) (construing statute *de novo* and rejecting agency's interpretation), and Judge Silberman himself has apparently abandoned his prior view. See *Kelley* v. *EPA*, 15 F.3d 1100, 1105 (D.C. Cir. 1994) (Silberman, J.) (because Congress "provided for *de novo* judicial review of [EPA's] 'particularized

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[5] Indeed, deference to Customs' legal interpretations under the Tariff Act would be particularly inappropriate, because the Customs Court Act of 1980 created an extreme form of *de novo* review. The 1980 Act constitutes one of the "few rare contexts" where "Congress so mistrusts the agency that it provides for an independent judicial fact finding as well as an independent judicial determination." 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.2 at 22 (2d ed. 1997). Congress' expression of mistrust of Customs, which echoes Justice Story's assessment from 150 years earlier, strongly counsels against deference to the agency's legal interpretations.



decision respecting liability,'" EPA regulation not entitled to *Chevron* deference despite EPA's formal rulemaking power).

In addition, the DOJ (which was primarily responsible for drafting the 1980 Act) has stated to Congress that Customs' construction of the tariff schedules (and not only its factual conclusions) would be effectively reviewed *de novo* in a subsequent court action – a view on which Congress relied when it enacted the 1980 Act. In a written submission to Congress during consideration of the 1980 Act, the Department (with the concurrence of the Deputy Chief Counsel of the Customs Service) explained:

> Over the years, the Customs Service has developed a procedure which it utilizes to provide advice to members of the public who wish to engage in an import transaction as to the manner in which the Service will treat an importation of merchandise, *for example, the manner in which the merchandise would be classified or valued under the Tariff Schedules of the United States.*
>
> Under current law, judicial review of a ruling issued pursuant to the procedure established by the Customs Service can effectively be obtained only after an importation has occurred, the merchandise is treated in accordance with the ruling, a protest is filed and denied, the duties assessed are paid, and a civil action contesting the denial of the ruling is instituted in the Customs Court. *The ruling is in effect reviewed in the course of the judicial proceeding in that the civil action challenges, in a trial de novo, a decision by the Customs Service made in accordance with the ruling.*
>
> We strongly believe that this current method of obtaining judicial review ought to be maintained.

1979 Senate Judiciary Committee Hearing 15 (emphasis added). Thus, the DOJ not only understood that its legal rulings on issues of classification under the Tariff Schedules are "in effect" reviewed *de novo* in the subsequent civil action, it urged

Congress to retain that scheme. By providing for a *de novo* trial of classification disputes, Congress preserved the *de novo* standard for legal issues that DOJ endorsed.

2. *De novo* review extends to questions of law even where, unlike here (see Part I.C, *infra*), Congress delegates substantive rulemaking power to an agency. For such delegation creates only a "*presumption*" that Congress intended the courts to defer to the agency's construction of the relevant statute. *Smiley* v. *Citibank (South Dakota)*, 517 U.S. 735, 740-41 (1996) (emphasis added). The Solicitor General's analysis not only begins, but ends with the articulation of this presumption. Pet. Br. 13, 23. Like all presumptions, however, this presumption can be overcome by indications in the "statutory scheme" that Congress did not intend deference to the agency's views. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-16 (1989).

Here, Congress has made plain, by providing for *de novo* judicial review, that it intends no deference to the agency's views on tariff classification. Although the United States asserts that such a reading would make the Tariff Act "the only instance of which we are aware in which Congress has stripped an agency of the deference to which its interpretations are traditionally entitled," Pet. Br. 22, this case is far from unique. When, as here, Congress has provided that a party's liability under a statute would be determined in an independent judicial trial, courts consistently have refused to accord *Chevron* deference even to "full dress" regulations, Pet. Br. 29, promulgated pursuant to a grant of substantive rulemaking power.

A leading case illustrating this principle is *Adams Fruit Company* v. *Barrett*, 494 U.S. 638 (1990). Although Congress delegated substantive rulemaking authority to the Department of Labor under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1861, and DOL exercised that authority by promulgating a regulation that construed the pre-



emptive scope of that Act, this Court declined to accord *Chevron* deference to that regulation. The Court reasoned that, by providing for a trial on liability in the federal district courts, "Congress ha[d] expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute." 494 U.S. at 649.

The proof that Congress did not intend the courts to defer to the agency's statutory construction even where the construction is embodied in regulations and even where the agency otherwise possesses substantive rulemaking power is overwhelming where Congress provides for *de novo* review. A perfect illustration of this is the Food Stamp Act. That Act expressly provides the Secretary of Agriculture with broad authority to "issue such regulations . . . as the Secretary deems necessary or appropriate for the effective and efficient administration of the food stamp program." 7 U.S.C. § 2013. Consistent with that authority, the Food and Nutrition Service has issued detailed guidelines specifying the circumstances in which stores will be disqualified from participating in the food stamp program for misuse of the stamps. Nevertheless, because that Act expressly provides for *de novo* review of the FNS' disqualification determinations, the uniform consensus of the courts of appeals is that those guidelines "are not binding on the court in making its de novo review." *Sims*, 860 F.2d at 863. Moreover, the outcome of those cases would not be different if the agency had issued regulations instead of guidelines, for the holdings turn not on the process that attended the promulgation of the agency's views, but on Congress's decision to provide for *de novo* judicial review. See *id.* Indeed, recognizing its limited role in a scheme providing for *de novo* review, the Agriculture Department itself now "strenuously object[s]" to characterizing its guidelines as binding regulations. *Id.* at 861.

Thus, because Congress provided for a *de novo* trial of classification disputes following the denial of a protest by Customs, it would be inappropriate, and contrary to Congress'

intent, to confer *Chevron* deference on Customs' constructions of the Tariff Schedules.[6]

### C. The Secretary's Limited Rulemaking Power Is An Independent Reason To Reject *Chevron* Deference

Even aside from the Act's provision for *de novo* review, the factual premise that underlies Customs' claim for deference is unfounded. Congress did not bestow upon the Customs Service substantive rulemaking power under the tariff schedules. This is abundantly clear because (1) the sources of authority Customs cited for its regulation do not give Customs such power; (2) if any agencies have such power, they are the USTR or ITC; and (3) most tellingly, Customs itself did not purport to exercise such power when it promulgated its regulations.

1. Congress delegated to the Secretary of Treasury the authority to issue only two types of regulations with respect to tariff classification: (1) rules that bind the thousands of customs officers in the hundreds of ports of entry nationwide, and that thus ensure a uniform enforcement policy; and (2) procedural regulations that determine the forms and other procedures that importers must follow in bringing goods into the country and preserving their claims. Congress simply did not vest in the Secretary the authority to issue substantive rules construing the meaning of the Tariff Schedules that would qualify for deference under *Chevron*.

When Customs promulgated the regulations at issue, it invoked as authority five different statutory provisions. Understandably, the United States' brief does not rely on (or

[6] The United States' reliance on *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978), Pet. Br. 21, which predates the 1980 Act, is unavailing. *Zenith* involved countervailing duties, which have sensitive foreign policy implications, not classification. Unlike for classification, the standard of review for countervailing duty cases was confused prior to 1979, when Congress first clarified that deferential APA review for countervailing duty cases was appropriate. *See* page 6, *supra*; *see also* 28 U.S.C. § 2640(b).



even mention) three of those provisions -- 5 U.S.C. § 301, 19 U.S.C. § 66, and 19 U.S.C. § 1624. Those provisions are nevertheless worth examining, because they illustrate how limited the Secretary's rulemaking power is in this area and help explain why Customs itself was careful to disclaim any attempt to exercise substantive rulemaking power when it issued these regulations.

The first section, 5 U.S.C. § 301, which applies to all executive departments, authorizes the "head of an Executive department" merely to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records." *Id.* This provision authorizes the Secretary to issue rules to govern the actions of the customs service, but not to promulgate rules that bind the public.

The rulemaking power conferred by 19 U.S.C. § 66 (entitled "Rules and forms prescribed by Secretary") is likewise limited:

> The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to customs officers and prescribe such rules and forms *to be observed by them* as may be necessary for the proper execution of the law.

*Id.* (emphasis added). Here again, Congress authorized the Secretary only to issue procedural rules for the public and "directions to customs officers," not substantive regulations that bind the public.[7]

[7] The Solicitor General's decision not to rely on a third statutory provision cited in the regulations -- 19 U.S.C. § 1624 -- is likewise well advised. Like the other provisions, § 1624 has long been construed to authorize the Secretary

(continued...)

The two statutory bases that the United States does offer in support of the Secretary's purportedly broad authority to issue substantive rules are in fact equally limited. First, the Solicitor General relies only on selected language from section 1502(a) (Pet. Br. 14) and omits the language that makes clear that the provision authorizes the Secretary simply to direct the uniform enforcement of the import laws by customs officers at the various ports of entry, not to issue rules that bind the public. In relevant part, section 1502(a) (entitled "Regulations for *appraisement* and *classification*") states:

> The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with law . . . to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon *at the various ports of entry*. The Secretary may direct any customs officer to go from one port of entry to another for the purpose of appraising or classifying or assisting in appraising or classifying merchandise imported at any port, and may direct any customs officer at any port to review entries of merchandise filed at any other port.

19 U.S.C. § 1502(a) (emphasis added). That section 1502 simply authorizes the Secretary to ensure uniformity among "the various ports of entry" by issuing directions to the customs officers is made unmistakably clear by section 1502(b):

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[7] (...continued)
to issue only "regulations which are addressed to the Collector of Customs for guidance in the conduct of the business of his office," but which need not be "compli[ed]" with as a "condition precedent to recovery." *See, e.g., United States* v. *Browne Vintners Co., Inc.*, 34 C.C.P.A. 112, 116 (1946). Moreover, as this Court has held, § 1624 is a general provision that "merely implement[s] authority which is granted the Secretary" elsewhere in the Act. *Barr* v. *United States*, 324 U.S. 83, 93 (1945). Section 1624 thus cannot be read to override the limitations on the Secretary's rulemaking authority contained in those provisions that specifically address classification, let alone to trump the force of the *de novo* review provision.



> It shall be the duty of all officers of the customs to execute and carry into effect any instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding *upon all officers of the customs.*

*Id.* § 1502(b) (emphasis added). Had Congress truly thought that § 1502(a) conferred upon the Secretary the authority to issue legislative rules that had the force and effect of law and that bind the courts and the public, it would have had no need to clarify that those regulations would also bind the "officers of the customs." Clearly, section 1502, like other "grants" on which the United States no longer relies, authorizes the Secretary to issue binding instructions to customs officers, but does not provide any basis for the Secretary to assume a substantive lawmaking power under the Tariff Schedules.

Finally, the United States relies on Headnote11 of the Tariff Schedules. By its express terms, however, that headnote authorizes the Secretary to issue regulations governing the "*admission*" of articles into the United States. "Admission" is a term used by Congress to refer to the physical movement of goods into the United States. *Cf.* 19 U.S.C. § 81c; 15 U.S.C. § 1124. The headnote simply recognizes the authority of the Secretary to issue procedural rules governing the manner in which goods may be admitted into the ports; it does not authorize the promulgation of any substantive rules governing the "classification" of articles. Indeed, the term "classification" appears only in the second sentence of the headnote, and it reveals how limited the Secretary's "rulemaking" role is under the tariff schedules. That sentence provides that the "allowance of an importer's claim for classification . . . *on the basis of facts which are not determinable from an examination of the article itself in the condition as imported*, is dependent upon his complying with any rules and regulations which may be issued

pursuant to this headnote." Headnote 11. By its terms, therefore, a claim for classification is dependent on compliance with the regulations issued under the headnote *only* where it is impossible for the customs officers to determine the correct classification on the basis of a physical examination of the article. The regulations to which this headnote refers are thus plainly procedural rules -- those that would assist a customs officer in an "examination of the article" -- and not substantive interpretations of the tariff schedule.

The legislative history of Headnote 11 overwhelmingly confirms that it was not intended to give Customs substantive rulemaking authority. Headnote 11, like the TSUS itself, was drafted for Congress' consideration by the United States Tariff Commission. As the United States conceded below (U.S. Fed. Cir. R. Br. 13), the legislative history of the headnote consists therefore in the "Submitting Report" prepared by the USTC. That report set forth the USTC's understanding of the relevant roles of the various organs of government "in connection with adoption of [the] proposed schedules":

> The Congress will need to enact implementing legislation . . .; the President will need to terminate or appropriately modify a number of outstanding proclamations related to the existing tariff laws; the Tariff Commission will need to bring the revision up to date to reflect customs rulings, legislation, or other actions taking place after submission of the proposed revision; *the Bureau of Customs will need to issue instructions to customs officers*; and the Bureau of Census will need to make provision for the statistical matters involved.

United States Tariff Commission, *Tariff Classification Study*, Submitting Report 28 (1960) (emphasis added).[8] The USTC

[8] The expression "customs rulings" is a reference to the obligation of the ITC

(continued...)



further underscored its expectation that Customs would be performing a purely enforcement role in implementing the tariff schedules: "[n]either the Bureau nor any of its field officers *has any discretion in determining a tariff classification of imported articles*. They are functioning strictly in an administrative capacity and must *enforce* the tariff laws *as enacted by the Congress* or as modified pursuant to duly constituted authority." *Id.* at 44 (emphasis added). The fact that the drafters of Headnote 11 viewed Customs strictly as an enforcement agency with no discretion in enforcing the schedules as enacted by Congress, and their intention to have the headnotes eliminate the need to exercise discretion,[9] confirms that Headnote 11 cannot reasonably be read as conferring substantive rulemaking authority on Customs to construe the schedules in a manner that would be binding on the courts and the public.

In light of Customs' limited role as an enforcement agency for tariff classifications, and of the limited role of the Secretary in issuing instructions to the customs officers, it would be highly unusual to accord Customs' interpretations any deference. As Justice Scalia observed in a related context, "[i]t is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding [a statute's] interpretation . . . but that is not the sort of specific responsibility for administering the law that triggers *Chevron*." *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

2. Indeed, the Solicitor General can make the claim that Congress delegated lawmaking power under the schedules to the Customs Service only by failing even to acknowledge the existence, much less account for the role, of two additional

(...continued)

to modify the schedules in light of *judicial* decisions in protest denial actions. *See* P.L. 87-456 § 202(c).

[9] See Opp. to Pet. for Cert. 27; Br. for Customs Bar Association as Amicus Curiae, 17-20.

bodies: The United States International Trade Commission ("ITC") (formerly the United States Tariff Commission), and the office of the United States Trade Representative ("USTR"). An examination of their roles shows that if Congress vested lawmaking power in any agency in connection with the tariff schedules, that agency is the USTR.

When Congress enacted the HTSUS in 1988, it understood that the schedule would need constant refining in light of changed conditions, administrative needs, and new treaties. It therefore directed the ITC to "keep the harmonized Tariff Schedule under continuous review" and to "recommend to the President such modifications in the [schedule] as the Commission considers necessary and appropriate" to "conform" to amendments to the Convention, "to ensure that [the schedules] are kept up to date in light of changes in technology or in patterns of international trade," and "to alleviate unnecessary administrative burdens." 19 U.S.C. § 3005(a). "In formulating recommendations" for modification to the schedules, the ITC is required to give all "interested parties" notice and an opportunity to comment. *Id.* § 3005(b), (b)(1).

On the basis of the "recommendations" of the ITC, the President is empowered by Congress to "proclaim modifications" to the schedules so long as those obligations are "in conformity" with U.S. obligations under the convention, and "do not run counter to the national economic interest of the United States." 19 U.S.C. § 3006(a), (a)(1), (a)(2). "Modifications" proclaimed by the President take effect after a 60-day layover period before Congress, and are published in the Federal Register. *Id.* § 3006(b), (c). Functionally, these "modifications" operate like legislative rules promulgated by the President. Consistent with Congress' instruction that "the United States Trade Representative is responsible for coordination of United States Trade policy in relation to the Convention," *Id.* § 3009, the President formally delegated his authority to place recommended modifications before the



Congress for review to the USTR – not to Customs.

In stark contrast to the role of the ITC as the expert independent agency entrusted with the constant study of economic, legal, administrative and technological changes that affect the schedules, and in opposition to the role of the USTR as the lead policy maker in formulating the nation's trade policy, the Customs Service's role under the schedules is simply that of a law enforcement body. Customs officers are authorized to carry weapons, execute search and arrest warrants, and "perform any other law enforcement duty" assigned to them by the Secretary. 19 U.S.C. § 1589a. The Commissioner of Customs is in turn authorized to "direct the advance of funds . . . in connection with the enforcement of the customs laws," *id.* § 2077, and is directed to submit annual studies on the "number and extent of violations of the trade, customs and illegal drug control laws," *id.* § 2083(a)(1), and to "develop a nationally uniform enforcement strategy for dealing" with such violations. Compare 19 U.S.C. §§ 3005(a), 3006(b), with 19 U.S.C. § 2083(c)(1).

In short, although Congress vested in the President (and thus indirectly in the USTR) the responsibility for crafting national trade policy, and delegated to the President (USTR) a lawmaking function under the schedules, with respect to tariff classification Congress expected Customs to perform strictly as a law enforcement agency.

3. Finally, it is Customs itself that has best expressed the limited nature of its grant of authority. In what is perhaps the most remarkable aspect of this entire dispute, the very regulations at issue here demonstrate that the Customs Service clearly understood when it issued these rules that they were simply enforcement guidelines that would not be binding on the courts. Specifically, in response to comments on the proposed rules, see 40 Fed. Reg. 43021, Customs added the following language to its final rule to distinguish its interpretive rules (described below) from its procedural rules:

> The definitions and regulations that follow are promulgated to inform the public of the constructions and interpretations that *the United States Customs Service shall give* to relevant statutory terms and to assure the impartial and uniform assessment of duties upon merchandise claimed to be partially exempt from duty . . . *at the various ports of entry*. *Nothing* in these regulations purports or *is intended to restrict* the legal right of importers or others *to a judicial review of the matters contained therein.*

19 C.F.R. § 10.11(a) (emphasis added); compare *id.* § 10.11(b) (describing procedural rules).[10] The United States' claim for deference to Customs' interpretation of the schedules is thus ironic, for if deference is owed to anything Customs has issued in this case it would be to this understanding of the limited nature of its own regulations. See *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (very great deference is paid to an agency's interpretation of its own regulations).

### D. The United States' Policy Arguments For Deference Are Groundless

Finally, the United States presents a number of policy arguments to support its claim that the Court should accord

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[10] In his formal delegation of authority to Customs, which the Solicitor General quotes out of context, Pet. Br. 13 n.3, the Secretary similarly described Customs' authority as limited to binding customs officials and informing the public of Customs' procedures, and made no mention of substantive rulemaking power:

> Regulations shall be prescribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury, except that regulations and instructions . . . which are effective only against persons in their capacity as officers, agents, or employees of the Customs Service, and which do not prescribe procedures which the public should know or follow in dealing with the Customs Service, may be prescribed by the Commissioner of Customs without the approval of the Secretary of the Treasury.

Treasury Dep't Order No. 165, T.D. 53160 (Dec. 15, 1952).



*Chevron* deference to Customs' constructions of the tariff schedules. Those claims should instead be presented to Congress, and, in any event, provide no support whatsoever for deference.

First, the United States claims that the Federal Circuit's holding would leave "the Customs Service without effective guidance." Pet. Br. 21. This claim is frivolous. Customs, like other enforcement agencies, has ample authority to issue guidelines that bind its officers in their day-to-day application of the schedules. That authority is in no way diminished simply because those regulations will not be binding on the courts in subsequent *de novo* trials.

Second, citing the House Report to the 1980 Act, the United States suggests that withholding deference to Customs' regulations would undermine Congress' goal of uniformity. Again, however, the Solicitor General quotes out of context. See Pet. Br. 22. Noting that "uniformity is threatened today because the federal district courts" share "jurisdiction" with the Customs Court, the House Report stated that the constitutional mandate of uniform duties will be achieved under the Act "'*by utilizing the national jurisdiction of the Customs Court* to provide uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions.'" H.R. Rep. No. 96-1235, at 29 (emphasis added). Congress thus ensured uniformity by creating a single national court to entertain civil actions -- not by relying on Customs to issue binding regulations.

Third, the United States complains that the *Mast* factors test produces an *ad hoc* approach. Even if so, the solution does not lie in deferring to the interpretations of the enforcement agency. If enforcement of a particular term in the Tariff Schedules creates "unnecessary administrative burdens," 19 U.S.C. § 3005(a)(4), the President, on the recommendation of the ITC, is authorized to modify that term. Alternatively, in a future case the United States could ask this Court to reverse the Federal

Circuit's multi-factor test and replace it with a more absolute inquiry. Disagreement with *Mast* provides no basis, however, for permitting Customs to take on a lawmaking role that cannot be squared with either the limited authority that Congress bestowed on it, or with Congress' decision to provide for a *de novo* trial of classification disputes.

## II. THE REGULATIONS MERIT NO DEFERENCE UNDER *CHEVRON*

The United States does not challenge the lower courts' determination under *Mast* that the curing operation at issue in this case was incidental to assembly. Rather, the Solicitor General seeks only to establish that his construction of 19 C.F.R. § 10.16(c) -- that permapressing, categorically, is an operation not incidental to assembly -- represents a reasonable interpretation of the HTSUS that is entitled to deference under *Chevron*. Accordingly, if this Court agrees that the CIT properly undertook a *de novo* review of Customs' decision to deny Haggar a duty allowance, the Court should affirm without reaching the reasonableness of Section 10.16(c).

If, however, this Court concludes that the *Chevron* framework is applicable to this case, then, as the Solicitor General suggested in seeking certiorari, a prudent course for this Court to follow would be to remand to the CIT for its determination because the administrative record is incomplete and because an assessment of reasonableness requires consideration of numerous factors and arguments not addressed below and better suited to a specialized court. Should the Court decide to resolve this issue now, however, then the United States' categorical interpretation of the statute should be granted no deference. The Government's interpretation is contrary to the plain language of the statute and to consistent agency practice, and its proposed application in this case is arbitrary.

### A. The Solicitor General's Interpretation Is Contrary To The Language Of The Statute

The first step in any inquiry under *Chevron* is "whether



Congress has directly spoken to the precise question at issue," for if it has, the Court "must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 842-43 & n.9. The second step, whether the administrative construction "is based on a permissible construction of the statute," arises only "if the statute is silent or ambiguous with respect to the specific question." *Id.* at 843 (footnote omitted). Here, the agency's regulations as interpreted by the Solicitor General cannot survive step one, because they conflict with the express command of the statute.

Section 10.16(c), according to the Solicitor General, first sets forth "a general regulatory definition of the statutory concept of operations 'incidental' to assembly," Pet. Br. 28, which identifies two types of non-incidental operations, those whose "primary purpose is the fabrication, completion, physical or chemical improvement of a component," and those that "are not related to the assembly process." 19 C.F.R. § 10.16(c). The regulation then "list[s] several specific operations that are deemed *not* to be incidental to assembly under the regulation," Pet. Br. 26, and identifies "[c]hemical treatment of components or assembled articles to impart new characteristics, such as . . . permapressing" as one such operation. § 10.16(c)(4). This regulation conflicts with the statute for two reasons.

First, the Solicitor General interprets the statute as permitting Customs to identifiy, in advance, certain operations that intrinsically are "not incidental to assembly," no matter what the facts surrounding a particular assembly process or incidental operation may be. Pet. Br. 26. That is not the inquiry that the statute commands. The statute asks not that an operation be compared to "assembly" in the abstract, but that it be compared to "the assembly process." 19 U.S.C. § 1202, subheading 9802.00.80. Because each article has its own assembly process, this language can meaningfully be read only to refer to the specific assembly process used to create the article whose duty is in question. That the statute requires a comparative inquiry

into the significance of a given operation in light of a particular assembly process, and not a classification *ex ante*, is further evidenced by the plain meaning of the term "incidental," which compels a comparative inquiry. See U. S. Opp. to Pet. for Cert., *Chrysler Corp.* v. *United States*, No. 95-2508 (1995) ("*Chrysler* Opp.") (ordinary meaning of "incidental" is "'subordinate, nonessential . . . occurring as a minor concomitant" or "being likely to ensue as a chance or minor consequence'") (quoting *Webster's Third New International Dictionary* (1986)); *Black's Law Dictionary* 762 (6th ed. 1990) (defining "incidental" as "[d]epending upon or appertaining to something else as primary").

Such a comparative inquiry into particular facts is precisely the approach developed by the United States Customs Court in *Mast* and endorsed by the Customs Service and the Solicitor General in the past. See Part II.B, *infra*. It is needed, as the United States explained in its opposition brief in the *Chrysler* case, to avoid the "absurd consequences" that would flow from treating the statute and regulations as ones that "'define'" particular operations as necessarily incidental or non-incidental. *Chrysler* Opp. at 5-6. Of course, just as the magnitude of "complex painting processes" could far outstrip a modest assembly process, see *id.*, so could a chemical treatment that imparted new characteristics to a garment be so modest as compared to assembly that it would be incidental. See Priv. Ltr. Rul. HQ 557195 (Oct. 14, 1993) (chemically treating garments with a fabric softener to impart "a softer, smoother feel" is incidental to assembly). Deeming particular operations to be inherently non-incidental to "assembly" in the abstract conflicts with the comparative inquiry mandated by the statute into "the assembly process" and its ancillary operations, and is therefore unreasonable.

Second, the agency erred not only in classifying certain operations, *ex ante*, as intrinsically incidental or non-incidental to "assembly," but also in using criteria for classifying



permapressing operations that conflict with the statute. Thus, Section 10.16(c) classifies as non-incidental those operations whose "primary purpose is the . . . chemical improvement" of a component. 19 C.F.R. § 10.16(c). The "primary purpose" criterion sweeps far too broadly, however, because -- by definition -- *any* operation that is not intended to assemble an article (and hence is not part of the assembly process) will have as its "primary purpose" some object other than assembly. Yet the statute plainly reveals that Congress intended to allow a duty allowance so long as the operation, though not part of the assembly process, was incidental to it.

Similarly, the classification is impermissible because it excludes from consideration operations whose primary purpose is the "chemical improvement" of a component of the article. Subheading 9802.00.80 of the HTSUS, however, permits a duty allowance for American-made products assembled abroad that "have not been advanced in value or *improved in condition* abroad *except* by being assembled and *except* by operations incidental to the assembly process such as cleaning, lubricating, and painting." 19 U.S.C. § 1202, item 807.00 (emphasis added). These words plainly indicate that operations that advance the value of a product or improve its condition do *not* preclude an allowance so long as those operations are incidental to the assembly process. As the court of appeals has recognized, "item 807.00 [the predecessor of Subheading 9802.00.80] logically assumes that there *has been* an advancement or improvement, but limits the extent of the advancement in value or improvement in condition to that which is brought about solely *by the act of assembly or operations incidental thereto*." *Miles* v. *United States*, 567 F.2d 979, 983 (C.C.P.A. 1978); *Mast Indus.*, 668 F.2d at 505-06.

The legislative history of item 807.00 confirms the plain meaning. The United States Tariff Commission drafted item 807.00 to overturn judicial precedent that had permitted a duty allowance for goods assembled abroad only "so long as the

American article itself has not been advanced in value or improved in condition." *C.J. Tower & Sons*, 33 Cust. Ct. at 14, 23; see U.S. Tariff Commission, *Tariff Classification Study*, Submitting Report, Schedule 8, at 13, 15 (1960); Tariff Schedules Technical Amendments Act of 1965, Pub. L. No. 89-241, § 85, 79 Stat. 933, 949 (1965). The point of item 807.00, then, was to ensure that articles could be improved in condition (or advanced in value) and still receive a duty allowance, so long as these improvements resulted from the assembly process and operations incidental thereto.

The examples in subsection 10.16(c)(4) of operations whose primary purpose is the "chemical improvement" of an article are thus impermissible. That subsection deems "[c]hemical treatment of components or assembled articles to impart new characteristics, such as . . . permapressing" to be non-incidental. 19 C.F.R. § 10.16(c)(4). To impart new characteristics through chemical treatment is simply one way to improve the condition or advance the value of an article. Thus, to identify an operation, such as permapressing, that imparts new characteristics barely begins the statutory inquiry; it does not say anything about whether that operation was "incidental to the assembly process." See Pet. App. 3a, 22a-23a.

What the agency meant by the other general criterion for classifying non-incidental processes, those which are "not related to the assembly process," 19 C.F.R. § 10.16(c), is not clear. But that criterion plainly provides no additional support for the permapressing regulation. The only factor mentioned in the regulations that would distinguish "permapressing" -- which the Solicitor General now claims is unrelated to assembly -- from "pressing," which *is* related to assembly under the regulations, see *id.* § 10.16(b)(7), is that permapressing involves a "chemical treatment" that is intended "to impart new characteristics," *id.* § 10.16(c)(4), and thus has as its "primary purpose" the "chemical improvement" of the article. *Id.* § 10.16(c). Thus, at least for "permapressing," the second general



criterion collapses into the first, plainly invalid criterion.

### B. The Solicitor General's Interpretation Of The Regulations Conflicts With Agency Practice

Even if Subheading 9802.00.80 could permissibly be read to permit Customs to "deem," *ex ante*, that certain operations inherently are, or are not, incidental to assembly, in practice that is not how Customs has read either the statute or its regulations. For this reason as well, the Solicitor General's interpretation merits no deference.

In Subheading 9802.00.80, Congress gave three examples of "operations incidental to the assembly process": cleaning, lubricating, and painting. As noted above, Customs' regulations provide a number of additional examples both of operations considered incidental to assembly and of those not considered incidental to assembly. 19 C.F.R. § 10.16(b)-(c). In case after case involving these operations, Customs has treated the examples listed in the statute and regulations not as binding classifications, but merely as examples.

In *General Motors Corp.* v. *United States*, 976 F.2d 716 (Fed. Cir. 1992), for instance, Customs successfully defended its determination that American-made automobile components that had undergone "finish painting" in Mexico were ineligible for a duty allowance. *Id.* at 717-19. In response to GM's argument that the statute expressly lists "painting" as an operation incidental to assembly, Customs argued against a categorical interpretation, reasoning that the type of painting involved in the case was "'not of such a minor nature as to be considered incidental to the main assembly process.'" *Id.* at 718.

Customs advanced the same interpretation of the statute in *Chrysler Corporation v. United States*, 86 F.3d 1173 (Fed. Cir.), *cert. denied*, 117 S. Ct. 82 (1996), which involved the same provisions at issue in *General Motors*. In opposing Chrysler's petition for certiorari, the Solicitor General argued that a categorical interpretation of the statute's listed examples

would conflict with its central purpose:

> There was no intent to have the listed examples become the tail that wagged the proverbial dog -- and to enable manufacturers to secure duty exemptions by "assembl[ing]" goods only as a minor or incidental aspect of complex painting processes that add vastly more value to the goods than the assembly itself.

*Chrysler* Opp. 5-6. The Solicitor General also maintained that the regulatory reference to "painting" could not be considered categorically as a safe harbor, and that the particular painting operation at issue needed to be evaluated on its facts: "The regulation on which petitioner relies, 19 C.F.R. § 10.16(b)(3), makes clear that the 'application of . . . paint' is offered merely as an 'example[] of operations which are incidental to the assembly process,' and does not support petitioner's contention that *all* painting therefore qualifies as incidental." *Id.* at 9-10 (omission and alteration in original).

Customs consistently has taken this same position in other cases requiring construction of these regulations. In *Surgikos* v. *United States*, 12 C.I.T. 242 (1988), Customs sought to treat a folding operation ("finish folding") as a non-incidental operation, even though subsection 10.16(b)(7) classifies "folding" as an operation "incidental to the assembly process." Based on a *Mast* analysis of the folding operation, the CIT found in favor of Customs, concluding that the time and cost involved in the operation were too considerable for it to be considered incidental to assembly. *Id.* at 245. Similarly, Customs has rejected a categorical interpretation of "cleaning," which both the statute, Subheading 9802.00.80, and its regulations, 19 C.F.R. § 10.16(b)(1), list as an example of an operation incidental to assembly. In a 1994 letter ruling, Customs announced that it would not "consider sterilization to be comparable to a cleaning process and incidental to assembly, without an analysis of the relevant factors in each case as set forth by the court in *Mast*." Priv. Ltr. Rul. HQ 557018 (Mar.



28, 1994). Thus, when a categorical reading would result in a diminution of the duties owed, Customs has not hesitated to adopt a flexible construction of its regulations.

Most notably, Customs has used a fact-sensitive analysis to permit an allowance even for permanent-pressed slacks. In a 1987 letter ruling, Customs advised a manufacturer that its slacks remained eligible for a duty allowance even though they had been treated with a chemical pressing agent after their assembly in Jamaica. Priv. Ltr. Rul. HQ 554399 (Jan. 15, 1987). Thus, even though the "[c]hemical treatment of components . . . to impart new characteristics," 19 C.F.R. § 10.16(c)(4), occurred abroad, Customs determined that the operation was "simpler than ordinary permanent pressing," and of "relatively minor cost," and on that basis concluded that it was "incidental to the assembly as part of the pressing operation." Priv. Ltr. Rul. HQ 554399. Once again, Customs did not treat its regulation as establishing conclusive presumptions that certain operations are non-incidental.

Indeed, the record in the instant case is fully consistent with this case-by-case approach. Customs did not rely on its regulation until it received the CIT's invitation, *after* post-trial briefing was otherwise complete, to address the issue. J.A. 9, Dkt. Nos. 54, 55. Rather, Customs analyzed whether one particular step in the permapressing process -- curing -- could be considered incidental to assembly.

The Solicitor General's new interpretation of the regulations thus conflicts with the agency's practice and with the Solicitor General's own defense of that practice in *Chrysler*. Moreover, nowhere in the administrative record did the agency explain or defend the view that certain processes are inherently not incidental (or are incidental) to assembly.[11] Accordingly, the

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[11] According to the Solicitor General (Pet. Br. at 26 n.11), the agency determined that permapressing is not an operation incidental to assembly in Headquarters Ruling 027763 (Sept. 13, 1973). But this cursory two-page

(continued...)

view propounded in the United States' brief should be deemed a litigating position not entitled to deference. *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 212 (1988) ("declin[ing] to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question"); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992).

In fact, this Court refused to countenance such opportunism in a case that, ironically, the Solicitor General now misreads and mistakenly relies upon in the final passage of the United States' opening brief. See Pet. Br. at 31 (quoting *United States* v. *Vowell & M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1810)). In *Vowell & M'Clean*, this Court held that, after Customs consistently had adopted a narrow definition of the word "imported" in instances when a narrow definition yielded higher duties, it could not change course and apply a broad definition of the term in order to avoid a diminution of duty. 9 U.S. (5 Cranch) at 372. In his opinion for a unanimous Court, Chief Justice Marshall concluded that Customs' new broad definition was incorrect, but noted that even "if the question had been doubtful," the Court would defer to the agency's longstanding construction of the term rather than to the agency's new litigation position. *Id.*

Here, once again, Customs has obtained higher duties by looking to the *Mast* factors to determine, case by case, whether particular "folding," "painting," and "cleaning" operations qualify as incidental under its regulations. It cannot now refuse to examine those factors in order to avoid the possibility that duties may be reduced. Accordingly, this Court should

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[11] (...continued)
letter states only that an oven-curing operation is not incidental to assembly because it "imparts a new set of characteristics" to the garments -- precisely the analysis that the plain language of the statute precludes. Like the regulations, this letter does not define permapressing or otherwise explain why any permapressing operation, no matter how insubstantial, can never be incidental to any assembly process.



"respect[] the uniform construction which it is understood has been given by the treasury department . . . upon similar questions," 9 U.S. (5 Cranch) at 372, and reject the United States' new categorical interpretation of Section 10.16(c). At a minimum, Customs must explain this disparate treatment, which precludes this Court from deciding whether the regulation is reasonable on the current record.

### C. The Solicitor General's Proposed Application Of 19 C.F.R. § 19.16(c) Here Is Unreasonable

Even if a categorical exclusion of permapressing operations could be reconciled with the plain language of the statute, the Solicitor General's proposed application of it to the facts of this case is arbitrary. The real issue here is not "permapressing," because the most significant step (given the regulations) in the permapressing process -- chemical treatment -- occurred in the United States. Pet. App. 8a-9a; J.A. 37-38, ¶¶ 48, 50. The only permapressing step that occurred abroad was curing -- the application of heat through pressing and ovenbaking. But it is clear that curing alone is not enough to make the permapressing regulation applicable, because it is undisputed both that Customs granted a duty allowance on Haggar's synthetic trousers, and that these pants were cured by the pressing done abroad. Pet. App. 8a, 16a; J.A. 33 ¶ 24, 48, 116; Tr. 74-75. If curing synthetic trousers is an operation incidental to assembly, then curing blended trousers should be so, too.

If there is any issue here, it is whether the use of *ovenbaking* in addition to pressing meaningfully distinguishes the curing operation used for blended fabric from the pressing operation used to cure synthetic fabric. On that issue, the regulations do not help Customs. Any attempt to analogize "ovenbaking" to the "chemical treatments" listed in section 10.16(c)(4) would be arbitrary. As noted above, it is plain that Customs does not consider applying heat to fabric in order to impart new characteristics to be a "chemical treatment," because it granted a duty allowance for synthetic pants that were pressed abroad in

order to achieve the "performance characteristics" associated with permanent press. *E.g.*, Pet. App. 8a; J.A. 33 ¶ 24, 48.

Indeed, if any regulation speaks to the issue, it is the regulation that specifically identifies "pressing" as an operation incidental to the assembly process. See 19 C.F.R. § 10.16(b)(7). Under the Solicitor General's categorical approach, any pressing operation that occurs after assembly should be deemed incidental. The post-curing operation that begins with pressing and is completed with oven-baking, Pet. App. 16a; J.A. 33, however, could be accomplished just as effectively -- although more expensively -- simply by pressing the pants for two or three extra minutes, and forgoing oven-baking altogether. J.A. 41-42, 57; Tr. at 79-87. Thus, the result of the Solicitor General's categorical approach is that a more expensive curing process (extended pressing) would automatically be deemed incidental to assembly, but a less expensive curing process (pressing plus oven-baking) is not -- even though each imparts the identical new characteristics and improved condition to the garment. This is precisely the sort of "absurd consequence[]," *Chrysler* Opp. 6, that caused the Solicitor General to reject the categorical approach to these regulations in *Chrysler*.

The Solicitor General's attempt to force this case into a pre-cast, inapt, permapressing slot is reminiscent of prior attempts by Customs to impose duties based on inflexible and arbitrary classifications. There, as here, the impermissible result was to make trivial distinctions between goods dispositive of a classification. In *Waite* v. *Macy*, 246 U.S. 606 (1918), this Court examined Customs regulations that established standards "of purity, quality, and fitness for consumption, of all kinds of tea imported," *id.* at 607 (citation omitted), but that Customs construed to bar the importation of high-quality, tea simply because it contained trace amounts of an innocuous food coloring. The Court concluded that the regulation, as interpreted by the Secretary, was arbitrary:

> Th[is] regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality, and fitness for consumption . . . . It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much.



*Id.* at 609. *Accord Morrill* v. *Jones*, 106 U.S. 466, 467 (1883).

**D. The Administrative Record Is Incomplete**

A final, independent reason not to defer to these regulations is that the agency has lost the administrative record. Although the United States asserts that this case involves a "full-dress regulation" that "reflect[s] the agency's consideration of the 'numerous comments received,'" Pet. Br. 29 (quoting 40 Fed. Reg. 43,021 (1975)), those comments evidently were lost when the Treasury Department moved offices in 1988.[12] Thus, what is before the Court is not a record of "notice-and-comment" proceedings, but one of mere "notice and result."

The absence of an administrative record alone defeats the Solicitor General's claim for deference. It is axiomatic that "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). Without access to the comments, neither respondent nor this Court can assess whether the regulations reflect a reasoned

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[12] Respondent submitted a FOIA request for the relevant documents, and that request is pending. Prior to submitting that request, counsel for Haggar attempted to obtain a copy of the record directly from the Treasury Department's Public Affairs Office, the Office of Regulation and Rulings, and the Disclosure Law Office, but was told that the materials either were lost or destroyed. Ten copies of the FOIA request and of a letter documenting the reported loss of the record, and copies of other documents identified in the Table of Authorities and of Trial Transcript pages not in the Joint Appendix but cited herein, have been lodged with the Clerk.

response to the "numerous comments" that concededly were put before the agency. Accordingly, the regulations merit no deference. At the very least, this Court should remand for such further proceedings as may be appropriate to determine whether the administrative record may be recovered and, if so, to give respondent and the lower courts an opportunity to address it. See 28 U.S.C. § 2643(b) (authorizing the CIT to "order such further administrative . . . procedures as the court considers necessary to enable it to reach the correct decision").

* * * * *

The regulation at issue here, at least as interpreted by the Solicitor General in this case, conflicts with the statute and with the practice of the agency and prior interpretations of the Solicitor General. Its proposed application in this case is arbitrary, and its reasonableness more broadly cannot be definitively assessed because the agency cannot produce the administrative record that ostensibly formed the basis for the rule. The notion that this Court should affirm this regulation as reasonable under *Chevron* is thus completely unsustainable.

The unreasonableness of the regulation serves ultimately, however, to highlight a more fundamental point, which is that the lower courts gave this regulation all the deference that it was due -- none. Given the long history of attempts by Customs to foist unreasonable interpretations of classification statutes upon importers (see, *e.g.*, *Vowell & M'Clean; Cary* v. *Curtis* (Story, J., dissenting); *Waite v. Macy*), it is entirely understandable that Congress deliberately provided importers the right to a *de novo* trial to challenge classifications. That most "sweeping" form of judicial review moots any claim to deference to these regulations which, by congressional and executive design, were intended to bind only Customs officers and not the courts.

## CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

Ronald W. Gerdes*
Gilbert Lee Sandler
Edward M. Joffe
Sandler, Travis & Rosenberg P.A.
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 638-2230

Carter G. Phillips
Mark E. Haddad
Daniel Meron
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Marc W. Joseph
Haggar Clothing Co.
6113 Lemmon Avenue
Dallas, TX 75209
(214) 956-4684

*Counsel For Respondent*

* Counsel of Record

# APPENDICES

# STATUTORY PROVISIONS

## (United States Code)

**19 U.S.C.**

**§ 66. Rules and forms prescribed by Secretary**

The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to duties on imports, or to warehousing, and shall give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.

**19 U.S.C.**

**§ 1502. Regulations for appraisement and classification**

**(a) Powers of Secretary of the Treasury**

The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry. The Secretary may direct any customs officer to go from one port of entry to another for the purpose of appraising or classifying or assisting in appraising or classifying merchandise imported at any port, and may direct any customs officer at any port to review entries of merchandise filed at any other port.

**(b) Duties of customs officers**

It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs.

**(c) Redesignated (b)**



**19 U.S.C.**

**§ 1514. Protest against decisions of Customs Service**

**(a) Finality of decisions; return of papers**

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), and section 1520 of this title (relating to refunds and errors), decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;

(6) the refusal to pay a claim for drawback; or

(7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title. When a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the Customs Service, which shall take action accordingly.

**(b) Finality of determinations**

With respect to determinations made under section 1303 of this title or subtitle IV of this chapter which are reviewable under section 1516a of this title, determinations of the Customs Service are final and conclusive upon all persons (including the United States and any officer thereof) unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade, or review by a binational panel of a determination to which section 1516a(g)(2) of this title applies is commenced pursuant to section 1516a(g) of this title and article 1904 of the North American Free Trade Agreement or the United States—Canada Free—Trade Agreement.

**(c) Form, number, and amendment of protest; filing of protest**

(1) A protest of a decision made under subsection (a) of this section shall be filed in writing, or transmitted electronically pursuant to an electronic data interchange system, in accordance with regulations prescribed by the Secretary. A protest must set forth distinctly and specifically—



(A) each decision described in subsection (a) of this section as to which protest is made;

(B) each category of merchandise affected by each decision set forth under paragraph (1);

(C) the nature of each objection and the reasons therefor; and

(D) any other matter required by the Secretary by regulation.

Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise, or with respect to a determination of origin under section 3332 of this title, that is the subject of a protest are deemed to be part of a single protest. A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest pursuant to section 1515 of this title at any time prior to the disposition of the protest in accordance with that section.

(2) Except as provided in sections 1485(d) and 1557(b) of this title, protests may be filed with respect to merchandise

which is the subject of a decision specified in subsection (a) of this section by—

(A) the importers or consignees shown on the entry papers, or their sureties;

(B) any person paying any charge or exaction;

(C) any person seeking entry or delivery;

(D) any person filing a claim for drawback;

(E) with respect to a determination of origin under section 3332 of this title, any exporter or producer of the merchandise subject to that determination, if the exporter or producer completed and signed a NAFTA Certificate of Origin covering the merchandise; or

(F) any authorized agent of any of the persons described in clauses (A) through (E).

(3) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) in inapplicable, the date of the decision as to which protest is made.

A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond. If another party has not filed a timely protest, the surety's protest shall



certify that it is not being filed collusively to extend another authorized person's time to protest as specified in this subsection.

**(d) Limitation on protest of reliquidation**

The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the Customs Service upon any question not involved in such reliquidation.

**(e) Advance notice of certain determination**

Except as provided in subsection (f) of this section, an exporter or producer referred to in subsection (c)(2)(E) of this section shall be provided notice in advance of an adverse determination of origin under section 3332 of this title. The Secretary may, by regulations, prescribe the time period in which such advance notice shall be issued and authorize the Customs Service to provide in the notice the entry number and any other entry information considered necessary to allow the exporter or producer to exercise the rights provided by this section.

**(f) Denial of preferential treatment**

If the Customs Service finds indications of a pattern of conduct by an exporter or producer of false or unsupported representations that goods qualify under the rules of origin set out in section 3332 of this title—

(1) the Customs Service, in accordance with regulation issued by the Secretary, may deny preferential tariff treatment to entries of identical goods exported or produced by that person; and

(2) the advance notice requirement in subsection (e) of this section shall not apply to that person;

until the person establishes to the satisfaction of the Customs Service that its representations are in conformity with section 3332 of this title.



**19 U.S.C.**

**§ 1515. Review of protests**

**(a) Administrative review within two years**

Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. Upon the request of the protesting party, filed within the time allowed for the filing of a protest under section 1514 of this title, a protest may be subject to further review by another appropriate customs officer, under the circumstances and in the form and manner that may be prescribed by the Secretary in regulations, but subject to the two-year limitation prescribed in the first sentence of this subsection. Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial of a protest under section 1514 of this title.

**(b) Request for accelerated disposition**

A request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail to the appropriate customs officer any time after ninety days following the filing of such protest. For purposes of section 1581 of Title 28, a protest which has not been allowed or denied in whole or in part within thirty

days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

**(c) Request for set aside of denial of further review**

If a protesting party believes that an application for further review was erroneously or improperly denied or was denied without authority for such action, it may file with the Commissioner of Customs a written request that the denial of the application for further review be set aside. Such request must be filed within 60 days after the date of the notice of the denial. The Commissioner of Customs may review such request and, based solely on the information before the Customs Service at the time the application for further review was denied, may set aside the denial of the application for further review and void the denial of protest, if appropriate. If the Commissioner of Customs fails to act within 60 days after the date of the request, the request shall be considered denied. All denials of protests are effective from the date of original denial for purposes of section 3626 of Title 28. If an action is commenced in the Court of International Trade that arises out of a protest or an application for further review, all administrative action pertaining to such protest or application shall terminate and any administrative action taken subsequent to the commencement of the action is null and void.

**(d) Voiding denial of protest**

If a protest is timely and properly filed, but is denied contrary to proper instructions, the Customs Service may on its own initiative, or pursuant to a written request by the protesting party filed with the appropriate port director within 90 days after the date of the protest denial, void the denial of the protest.



**19 U.S.C.**

**§ 3005. Commission review of, and recommendations regarding, the Harmonized Tariff Schedule**

**(a) In general**

The Commission shall keep the Harmonized Tariff Schedule under continuous review and periodically, at such time as amendments to the Convention are recommended by the Customs Cooperation Council for adoption, and as other circumstances warrant, shall recommend to the President such modifications in the Harmonized Tariff Schedule as the Commission considers necessary or appropriate—

(1) to conform the Harmonized Tariff Schedule with amendments made to the Convention;

(2) to promote the uniform application of the Convention and particularly the Annex thereto;

(3) to ensure that the Harmonized Tariff Schedule is kept up-to-date in light of changes in technology or in patterns of international trade;

(4) to alleviate unnecessary administrative burdens; and

(5) to make technical rectifications.

**(b) Agency and public views regarding recommendations**

In formulating recommendations under subsection (a) of this section, the Commission shall solicit, and give consideration to, the views of interested Federal agencies and

the public. For purposes of obtaining public views, the Commission—

(1) shall give notice of the proposed recommendations and afford reasonable opportunity for interested parties to present their views in writing; and

(2) may provide for a public hearing.

**(c) Submission of recommendations**

The Commission shall submit recommendations under this section to the President in the form of a report that shall include a summary of the information on which the recommendations were based, together with a statement of the probable economic effect of each recommended change on any industry in the United States. The report also shall include a copy of all written views submitted by interested Federal agencies and a copy or summary, prepared by the Commission, of the views of all other interested parties.

**(d) Requirements regarding recommendations**

The Commission may not recommend any modification to the Harmonized Tariff Schedule unless the modification meets the following requirements:

(1) The modification must—

(A) be consistent with the Convention or any amendment thereto recommended for adoption;

(B) be consistent with sound nomenclature principles; and



(C) ensure substantial rate neutrality.

(2) Any change to a rate of duty must be consequent to, or necessitated by, nomenclature modifications that are recommended under this section.

(3) The modifications must not alter existing conditions of competition for the affected United States industry, labor, or trade.

19 U.S.C.

## § 3006. Presidential action on Commission recommendations

### (a) In general

The President may proclaim modifications, based on the recommendations by the Commission under section 3005 of this title, to the Harmonized Tariff Schedule if the President determines that the modifications—

(1) are in conformity with United States obligations under the Convention; and

(2) do not run counter to the national economic interest of the United States.

### (b) Lay-over period

(1) The President may proclaim a modification under subsection (a) of this section only after the expiration of the 60-day period beginning on the date on which the President submits a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate that sets forth the proposed modification and the reasons therefor.

(2) The 60-day period referred to in paragraph (1) shall be computed by excluding—

(A) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die; and



(B) any Saturday and Sunday, not excluded under subparagraph (A), when either House is not in session.

### (c) Effective date of modifications

Modifications proclaimed by the President under subsection (a) of this section may not take effect before the 15th day after the date on which the text of the proclamation is published in the Federal Register.

28 U.S.C.

**§ 1581. Civil actions against the United States and agencies and officers thereof**

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Action of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Action of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Action of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.



(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreement Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act;

(2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930; and

(3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under Section 499(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty,

marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade



Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

**28 U.S.C.**

**§ 2638. New grounds in support of a civil action**

In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground—

(1) applies to the same merchandise that was the subject of the protest; and

(2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.



**28 U.S.C.**

**§ 2640. Scope and standard of review**

(a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:

(1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.

(2) Civil actions commenced under section 516 of the Tariff Act of 1930.

(3) Civil actions commenced to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979.

(4) Civil actions commenced under section 777(c)(2) of the Tariff Act of 1930.

(5) Civil actions commenced to review any decision of the Secretary of the Treasury under section 641 of the Tariff Act of 1930, with the exception of decisions under section 641(d)(2)(B), which shall be governed by subdivision (d) of this section.

(6) Civil actions commenced under section 1582 of this title.

(b) In any civil action commenced in the Court of International Trade under section 516A of the Tariff Act of 1930, the court shall review the matter as specified in subsection (b) of such section.

(c) In any civil action commenced in the Court of International Trade to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or any final determination of the Secretary of Commerce under section 251 or section 271 of such Act, the court shall review the matter as specified in section 284 of such Act.

(d) In any civil action commenced to review any order or decision of the Customs Service under section 499(b) of the Tariff Act of 1930, the court shall review the action on the basis of the record before the Customs Service at the time of issuing such decision or order.

(e) In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.



**28 U.S.C.**

**§ 2641. Witnesses; inspection of documents**

(a) Except as otherwise provided by law, in any civil action in the Court of International Trade, each party and its counsel shall have an opportunity to introduce evidence, to hear and cross-examine the witnesses of the other party, and to inspect all samples and papers admitted or offered as evidence, as prescribed by the rules of the court. Except as provided in section 2639 of this title, subsection (b) of this section, or the rules of the court, the Federal Rules of Evidence shall apply to all civil actions in the Court of International Trade.

(b) The Court of International Trade may order that trade secrets and commercial or financial information which is privileged and confidential, or any information provided to the United States by any foreign government or foreign person, may be disclosed to a party, its counsel, or any other person under such terms and conditions as the court may order.

**28 U.S.C.**

**§ 2645. Decisions**

(a) A final decision of the Court of International Trade in a contested civil action or a decision granting or refusing a preliminary injunction shall be supported by—

(1) a statement of findings of fact and conclusions of law; or

(2) an opinion stating the reasons and facts upon which the decision is based.

(b) After the Court of International Trade has rendered a judgment, the court may, upon the motion of a party or upon its own motion, amend its findings or make additional findings and may amend the decision and judgment accordingly. A motion of a party or the court shall be made not later than thirty days after the date of entry of the judgment.

(c) A decision of the Court of International Trade is final and conclusive, unless a retrial or rehearing is granted pursuant to section 2646 of this title or an appeal is taken to the Court of Appeals for the Federal Circuit by filing a notice of appeal with the clerk of the Cour of International Trade within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts.